



November 16, 2012

**EPA Responses to Tribal Comments on
2011 Indian General Assistance Program (GAP)
*Guidebook for Building Tribal Environmental Capacity***

Introduction

This document contains the Environmental Protection Agency's (EPA) responses to comments received between August 1, 2011 and January 30, 2012 during consultation and collaboration with tribal governments on EPA's proposed "Guidebook for Building Tribal Environmental Capacity." As a result of the comments we received, we have made significant changes to the proposed document (now presented as Appendix I of a revised GAP Guidance). EPA thanks to those who took time to review the GAP Guidebook document and provide us with very valuable input.

The response document is organized into four parts:

- (1) General and Process-Oriented Comments;
- (2) Comments Related to GAP Recipient Eligibility;
- (3) Comments Related to Joint EPA-Tribal Environmental Plans; and
- (4) Allowable Activities & Capacity Indicators

Throughout the initial six month consultation and coordination process on the GAP Guidebook, EPA solicited and received many constructive and helpful comments on how vital the GAP grant program is for tribes and tribal communities. Comments ranged from general statements describing the diversity of issues tribes face when developing their environmental programs to specific editorial suggestions on how to improve the text presented in the document. EPA gathered input through numerous listening sessions and meetings with tribes and tribal organizations, two national consultation conference calls, numerous regional conference calls, and a total of 64 written submissions.

Many of the comment letters that EPA received contained suggestions on specific ways EPA could improve the GAP grant program and we look forward to continuing our collaborative work with tribes to strengthen the program and protect the human health and environment of tribal communities throughout the country.

This document represents EPA's responses to the written comments received during the August 2011 – January 2013 consultation and coordination process; similar comments have been grouped together and summarized.

(1) General and Process-Oriented Comments

Comment (a): **The proposed GAP Guidebook goes beyond what the EPA Office of Inspector General (OIG) recommended in their February 19, 2008 audit report, “EPA Framework for Developing Tribal Capacity Needed in the Indian General Assistance Program” (Report No. 08-P-0083).**

Response (a):

The February 19, 2008 OIG report made several recommendations based on their finding that the Agency had failed to provide a framework for tribes to follow or adapt on the path toward capacity to administer environmental programs. Specifically, the OIG recommended that the Assistant Administrator: 1) Require the American Indian Environmental Office to develop and implement an overall framework for achieving capacity, including valid performance measures for each type of tribal entity, and provide assistance to the regions for incorporating the framework into the IGAP work plans; 2) Require regions to (a) negotiate with tribes to develop environmental plans that reflect intermediate and long-term goals, (b) link those plans to annual IGAP work plans, and (c) measure tribal progress in meeting plans and goals; and 3) Revise how IGAP funding is distributed to tribes to place more emphasis on tribes’ prior progress, environmental capacity needs, and long-term goals.

EPA concurred with these OIG recommendations and committed to evaluating the IGAP program and incorporating new ways to improve the program’s effectiveness without compromising the flexibility provided to tribes. EPA also committed to developing a comprehensive GAP framework document that would include a process for negotiating joint EPA-tribal environmental plans with goals and a method of measuring progress toward meeting those goals. That framework is embodied in the proposed GAP Guidance (which describes a process for joint EPA-tribal environmental protection planning) and in the revised Guidebook for Building Tribal Environmental Capacity, included as Appendix I to the Guidance (which contains the specific capacity building indicators). This overall framework can be used to measure the progress we are making under GAP to establish tribal environmental protection program capacity. By establishing this framework as new GAP Guidance, EPA is also fulfilling its commitment to ensure that joint EPA-tribal planning and capacity indicators are linked to the GAP-funded work described in the annual work plans of GAP assistance recipients.

Comment (b): **The GAP Guidebook did not specify whether it would be released as guidance, policy, or regulation.**

Response (b):

The Guidebook is Agency guidance. In its revised form, EPA has restructured the Guidebook and integrated it into a proposed new GAP Guidance as Appendix I. When finalized, the new Guidance will supersede the existing March 9, 2000 and February 24, 2006 GAP Guidance. The GAP regulations at 40 C.F.R. Part 35 §B remain unchanged.

(1) General and Process-Oriented Comments – con’t

Comment (c): **The Guidebook does not discuss EPA’s trust responsibility to the tribes, which includes maintaining an environmental presence.**

Response (c):

The new Guidance addresses EPA’s trust responsibility on page 2, Section 1.1: *“In keeping with its federal trust responsibility, the Agency works with tribes to ensure that EPA’s environmental protection programs are implemented throughout the country. Depending on the particular federal statute, the Agency has a number of options to ensure that regulated facilities, sites, and/or activities are in compliance with federal requirements. For example, the Agency can directly administer a federal program, approve eligible tribes to administer the program, or work cooperatively with tribes on a government-to-government basis to protect human health and the environment. No matter which mechanism EPA employs in carrying out its mission, the Agency strives to work closely with tribal governments, consider tribal interests, and encourage tribal governments’ to develop their own environmental protection programs.”*

Section A.3 of the proposed new GAP Guidance specifically addresses “environmental presence” and acknowledges that tribes may need continued funding to sustain their programs after basic capacity has been established. However, the Guidance and Guidebook also clarify that maintaining environmental protection program capacities is an on-going effort requiring capacities to evolve as a tribal environmental protection program confronts ongoing and new challenges. As a result, GAP recipients should use the joint EPA-Tribal Environmental Plans described in Section 4 of the new Guidance to establish program development milestones that demonstrate how GAP funding will expand, enhance, or evolve their capacity rather than simply maintaining a status quo from year to year.

Comment (d): **The EPA should complete the Guidebook chapter on Implementation (Chapter 9) and consult with tribes on this chapter.**

Response (d):

The initial consultation draft Guidebook contained a blank “Implementation” section as a place holder. Implementation components are now covered by the GAP Guidance and the place holder section has been removed from the Guidebook document. The new proposed GAP Guidance contains detailed descriptions throughout the document of how EPA will implement the Guidance. For example, Section 1.3 of the proposed Guidance describes roles and responsibilities of EPA offices for implementing the Guidance. Section 3.0 provides information on how EPA will use capacity indicators to measure environmental program capacity for each tribe. Section 4.0 describes how EPA and the tribe will implement joint EPA-Tribal Environmental Plans. Section 6.2 details criteria that EPA regional offices will use to review GAP funding proposals.

As with the initial August 2011 – January 2012 consultation and coordination process, EPA will consult with tribes on the proposed new GAP Guidance and revised Guidebook documents consistent with the *EPA Policy on Consultation and Coordination with Indian Tribes* (www.epa.gov/tribal/consultation/consult-policy.htm).

(2) Comments Related to GAP Recipient Eligibility

Comment (a): The proposed Guidebook does not adequately address how tribes that are not currently seeking to implement federally authorized regulatory and enforcement programs (“treatment in a manner similar to a state”), or that may have limited environmental regulatory jurisdiction, will be affected once it is determined that “core program capacities” have been met.

Response (a):

The proposed new GAP Guidance acknowledges that tribes may develop non-regulatory environmental protection program capacities under the GAP consistent with the tribes’ own priorities and authorities. The proposed new Guidance also specifically states that federally recognized tribes with limited jurisdiction continue to be eligible for GAP funding. For example:

The new GAP Guidance states in Section 1.1 (p. 2): “Through the GAP, the EPA also provides technical assistance to build environmental protection program capacity for tribes that are not implementing federally authorized regulatory programs or that may wish to go beyond federal requirements. This approach helps EPA ensure that tribes have the opportunity to meaningfully participate in the Agency’s policy making, standard setting, and direct implementation activities potentially affecting tribal interests. This approach also helps tribal governments cooperate with and, when appropriate, enter into intergovernmental agreements with federal, state, or local governments in an informed manner.”

The new GAP Guidance states in Section 3.0 (p. 12): “Tribes that are not seeking TAS status may wish to establish other meaningful and important levels of environmental program capacity directly in support of environmental statutes the EPA implements, or for tribal environmental protection programs that are consistent with EPA’s programs. Seeking TAS status is not a requirement for receiving funding under this program.”

Section A.2 of the new Guidebook states (p. 2): “Tribes with limited jurisdiction to implement environmental regulatory programs may use GAP funds to develop program capacities for purposes consistent with the extent of their authorities, such as: evaluating environmental conditions; developing voluntary environmental protection programs; participating in environmental policy making; coordinating with EPA or other federal agencies on the implementation of federal environmental protection programs; and entering into joint environmental protection programs with neighboring tribal, state, or local environmental agencies.”

(2) Comments Related to GAP Recipient Eligibility – con’t

Section A.3 of the new Guidebook states (p. 2): *“EPA recognizes that developing, establishing, and maintaining environmental program capacities is an on-going effort requiring capacities to evolve as the tribal environmental program itself expands and undertakes additional challenges. EPA also recognizes that GAP resources provide a significant foundation for maintaining tribal environmental program capacities over time. Tribes that have successfully developed capacity in a given area may continue to receive GAP funding to expand, enhance, or evolve their capacity.”*

In addition, non-regulatory indicators of tribal environmental protection program capacity that do not require a jurisdictional determination are contained throughout sections B-F of the new Guidebook.

Comment(b): **The Guidebook should use the term “federally recognized tribal governments’ rather than “Indian Country” to be fully inclusive of current GAP recipients and to ensure that Alaska Native Villages are adequately and fully considered.**

Response (b):
Significant efforts were made to minimize references to “Indian country,” in light of this concern. The Indian General Assistance Program Act of 1992 authorizes *all* federally recognized tribes – including those in Alaska – to receive funding under the program. The new GAP Guidance and Guidebook does not exclude any tribal government or eligible intertribal consortium from receiving GAP assistance.

Comment (c): **The Guidebook should expressly acknowledge that GAP funding can be used for activities that do not necessarily lead to an EPA approved or authorized program. Commenters recommend that the EPA develop and include a new section in the Guidebook that provides a capacity building framework for, “projects and issues unrelated to EPA authorities and programs.”**

Response (c):
The proposed new GAP Guidance and Guidebook encourages tribes that wish to develop the capacity to implement federal regulatory and enforcement programs to do so, consistent with their jurisdiction and authorities. The proposed new Guidance also acknowledges that many tribes are not currently seeking to build the capacity to take the lead role for implementing programs administered by EPA and indicators have been added to emphasize a broad range of eligible tribal program capacities in addition to EPA approved or authorized programs. The proposed documents do not require recipients to demonstrate regulatory jurisdiction over facilities, activities, or sites within their territories before receiving GAP assistance. EPA does not have the authority to approve the use of GAP funds for projects or issues unrelated to EPA authorities or programs.

(2) Comments Related to GAP Recipient Eligibility – con’t

Comment (d): Several commenters raised concerns with specific time lines for establishing environmental protection program capacities and that recipients would no longer be eligible to receive GAP assistance beyond the time lines indicated.

Response (d):

The new documents do not establish specific time lines for building capacity. However, the documents do emphasize the importance of demonstrating that recipients of GAP funds are making progress on establishing program capacity over time.

(3) Comments Related to Joint EPA-Tribal Environmental Plans

Comment (a): Joint EPA-tribal planning agreements negotiated between tribes and EPA can provide a framework to guide the tribal-Agency relationship. However, the Agency must honor tribally defined priorities and interests and should provide each tribe sufficient flexibility in the definition of goals, pathways, and indicators of capacity.

Response (a):

Section 4.0 of the proposed new GAP Guidance describes joint EPA-Tribal Environmental Plans (ETEPs) and provides a flexible approach that may vary from tribe to tribe. Recognizing that there is great variation in the size of tribal governments and the range of environmental issues and program capacities tribes are seeking to address with GAP resources, it is expected that the length and level of detail for the ETEPs will also be greatly varied.

The proposed new Guidance states: *“Regions and tribes are expected to develop an ETEP that contains the following components: (1) identification of tribal environmental program priorities, including capacity building and program implementation goals; (2) identification of EPA program priorities and management requirements; (3) an inventory of regulated facilities/sites/activities; and (4) identification of mutual roles and responsibilities.”* By structuring the ETEP around tribal priorities and program development goals, as well as EPA program requirements, the proposed GAP Guidance is expected to help tribes and EPA ensure that GAP work plans are developed to support the long-term priorities and goals of the tribe and that GAP funds are directed toward building environmental program capacities consistent with those goals and EPA authorities.

(3) Comments Related to Joint EPA-Tribal Environmental Plans – con’t

Comment (b): Describe how EPA will revise the distribution of GAP funding to emphasize prior progress, environmental capacity needs, and long-term goals.

Response(b):

EPA does not have immediate plans to revise the funding formula for distributing GAP funding to EPA regional offices. However, Section 6.2 (p. 18-19) of the proposed Guidance provides a list of factors that EPA regional office will consider when making funding decisions on specific GAP applications. These factors include:

- The extent to which the proposed activities in the work plan support the purpose of the GAP.
- The feasibility and likely effectiveness of the proposed activities.
- The extent to which the budget, resources, and requested funds for key personnel are reasonable and sufficient to accomplish the proposed project.
- The degree to which the work plan identifies the expected environmental results of the proposed project.
- The degree to which the proposed activities in the work plan support achieving the long-term goals identified in the EPA-Tribal Environmental Plans.
- Prior performance.

Comment(c): Eliminate text related to EPA regional offices evaluating how the primary federal statutes administered by EPA apply in each tribal area.

Response (c):

As EPA’s 1984 Indian Policy underscores, until tribal governments assume responsibility for managing programs authorized, approved, or delegated by the Agency, EPA retains responsibility for human health and environmental protection by managing federal statutory environmental programs in Indian country. Section 4.3 of the proposed new GAP Guidance states: “*Reviewing federal environmental programs that EPA implements in each tribal area can provide important background information useful for developing an ETEP (e.g., documenting which programs the tribe is implementing with TAS status; documenting which program the tribe is not planning to develop; and identifying programs that are not relevant currently because there is no applicable regulated facility in the tribal area [e.g., no underground storage tanks in the area, no facility requiring an air discharge permit, etc.]).*” To protect human health and the environment, tribes may wish to partner with EPA or assume a lead role for implementing federal programs, as appropriate.

(4) Allowable Activities & Capacity Indicators

Comment (a): Are tribes required to establish all of the core capacities?

Response (a):

Tribes are not required to establish all of the core or media specific environmental protection program capacities. Section 3 of the proposed new GAP Guidance states: *“The indicators are a tool to help tribes as they plan for program capacity development. These indicators provide a “road-map” for building a tribal environmental program and will help tribes and EPA identify both short-term and long-term goals and activities for a tribe that is building environmental capacities under this grant program.”*

Comment (b): **The Indicators should be presented as one set of possible criteria or expanded to include a wide variety of actions that could be considered in evaluating the effectiveness of a program and in considering whether a tribal government is building capacity.**

Response (b):

Section 3.0 of the proposed new GAP Guidance states: *“Other indicators of capacity may be identified in GAP assistance agreement work plans or in long-term planning agreements, on a tribe-by-tribe basis, reflecting the unique priorities and program development plans of a particular recipient.”*

Comment (c): **GAP funds should address tribal environmental priorities without the stipulation of targeting funding to support the objectives of EPA’s statutory and regulatory programs. The Guidebook should include flexibility to allow tribes to address their own priorities outside the context of statutes administered by EPA.**

Response (c):

Section A.1 of the revised Guidebook (p. 1) states: *“It is important to note that while this Guidebook outlines key indicators for developing capacities for the major environmental protection programs, it should not be interpreted as a prescription for all tribal environmental protection programs. As noted in the Guidance, where indicators provided here are not appropriate or applicable, the grantee should work with the EPA to identify appropriate capacity building indicators for inclusion in the work plan and ETEP, to link the funded activities to the program capacity being developed. Each tribe should define the scope and content of its particular environmental program based on its priorities, environmental conditions, jurisdictional situation, or other factors.*

Where there are connections between tribal environmental priorities and the federal environmental statutes, this Guidebook provides a menu of applicable capacity building indicators that will assist in planning capacity building activities and measuring progress in development of those capacities. For tribal program activities that are outside the scope of EPA authority, and in keeping with the Agency’s 1984 Indian Policy, EPA will encourage cooperation between tribes and other appropriate federal agencies, state and local governments, and non-

governmental organizations to resolve environmental problems of mutual concern where appropriate.”

Comment (d): **The capacity, implementation, and indicator lists are confusing.**

Response (d):

To help reduce confusion, the revised Guidebook no longer contains indicators of program implementation (with the exception of solid and hazardous waste program implementation) and presents a far more expansive set of program capacity building indicators.

Comment (e): **Can GAP funds be used to conduct cleanup activities?**

Response (e):

Yes. Section E.2 of the revised GAP Guidebook states: *“EPA’s main tribal solid waste priority, intended to address the most pressing waste-related environmental issues in Indian country, is the promotion of sustainable tribal waste management programs through the development and implementation of Integrated Waste Management Plans (IWMPs). EPA will focus GAP funding on this priority.”*

Section E.4(b) of the Guidebook states: *“While GAP funds may be used for solid and hazardous waste program implementation activities, **including cleanup activities**, GAP will remain focused on supporting tribal government efforts to develop a sustainable program designed to address and prevent new, or recurring, unauthorized dumping on tribal lands.”* This section describes the conditions under which EPA would approve the use of GAP funds for cleanup.